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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4933 OF 2017

Sabruddin H.A. Shaikh @ Shabbu	...	Petitioner
V/s.		
Vijay Vitthal Sonawane	...	Respondent

Mr. V. S. Kapse, i/by Nikhil Suryakant
Rajeshirke, for the Petitioner
Mr. Vijay Sonawane, Respondent in person.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 19th DECEMBER, 2017.

P.C. :

1] Heard learned counsel for the petitioner and respondent No.1, who is appearing in person.

2] By this petition, filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 15th April 2017 passed by the Member Co-operative Appellate Court, Mumbai thereby dismissing A.O.No.45/17 preferred by the petitioner against the order dated 3rd February, 2017, passed by the Co-operative Court No.3, below exh.61 in Dispute No.CC/III/295/2014.

3] By the impugned order, the trial Court has refused to set aside the exparte order passed against the petitioner and said order

passed by the trial Court is confirmed by the Appellate Court by dismissing the petitioner's appeal.

4] Admittedly in this case, it is on the application of respondent himself the petitioner was joined as opponent No.2 in the proceeding before the Co-operative Court, on the ground that he is in illegal possession of the premises. As per respondent, the summons of the said proceeding was duly served on the petitioner by affixing the same on the door of his house. For that purpose the copy of the summons report is also relied upon to show that it was served by affixing the same in presence of respondent. Relying on the same, both the Co-operative Court and Appellate Court have held that the summons was duly served on the petitioner.

5] Learned counsel for the petitioner, however, relying upon provisions of Order V Rule 19 of Code of Civil procedure, submits that the examination of Servicing Officer on oath was necessary to prove the proper service of summons.

6] In my considered opinion, instead of entering into the the question as to whether the summons was duly served or not as required under the provisions of Order V Rule 19 of CPC, it would serve the substantive cause of justice if the petitioner is given an opportunity to contest the matter before the trial Court by setting aside the exparte order passed against him. It is true that the

proceedings were instituted in the year 2004 before the Co-operative Court and by now 13 years have been lapsed, but the fact remains that without joining of the petitioner, who is alleged to be in illegal possession of the premises, the Respondent will face difficulty in execution proceeding.

7] In such situation, it would be always desirable that, the petitioner should be given an opportunity to contest the case. In order to compensate the respondent, the impugned order passed by the trial Court and the Appellate Court needs to be set aside subject imposing heavy costs. Learned counsel for the petitioner is also ready for the same.

8] Considering the time lapsed from the date of filing of the proceeding before the trial Court and having regard to the entire facts of the case which show that the petitioner was aware of filing of this proceeding as can be seen from his statement recorded in the criminal case, costs of Rs.50,000/- would be just and reasonable. As the matter is dragged for so many years, it is expected that the trial Court shall decide it expeditiously in a time bound manner, preferably within three months.

9] Accordingly, Writ Petition is allowed. The impugned orders passed by the Appellate Court and trial Court are quashed and set aside. As a result exparte order passed against petitioner is also

set aside subject to petitioner's depositing or paying costs of Rs.50,000/- to the respondent No.1, within 15 days from the date of this order.

10] Thereafter the trial Court shall decide the proceeding before it as expeditiously as possible and preferably within three months from the receipt of this order.

11] The petition is disposed of in above terms.

12] The parties to act on the authenticated copy of this order.

[DR. SHALINI PHANSALKAR-JOSHI, J.]